

# State of California



## Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 • • • 1100 K STREET BUILDING, SACRAMENTO, 95814

Technical Assistance  
(916) 322-5662

• • Administration • •  
322-5660

• • Executive/Legal • •  
322-5901

• • Enforcement  
322-6441

December 11, 1984

Robert E. Murphy  
Kronick, Moskovitz, Tiedemann  
& Girard  
770 L Street, Suite 1200  
Sacramento, CA 95814-3363

Re: A-84-299

Dear Mr. Murphy:

Your letter requesting advice under the Political Reform Act has been referred to Robert E. Leidigh, an attorney in the Legal Division of the Fair Political Practices Commission. If you have any questions about your advice request, you may contact this attorney directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or unless more information is needed to answer your request, you should expect a response within 21 working days.

Very truly yours,

A handwritten signature in cursive script that reads "Barbara A. Milman".  
Barbara A. Milman  
General Counsel

BAM:plh

# State of California



## Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 • • • 1100 K STREET BUILDING, SACRAMENTO, 95814

Technical Assistance • • Administration • • Executive/Legal • • Enforcement • • Statements of Economic Interest  
(916) 322-5662 322-5660 322-5901 322-6441 322-6444

January 16, 1985

Gerard Rose  
Greve, Clifford, Diepenbrock & Paras  
1000 G Street, Suite 400  
Sacramento, CA 95814-0885

Re: Your Request for advice on  
Behalf of Dr. Frank Clendenen  
Our Nos. A-84-306 and A-84-299

Dear Mr. Rose:

We have received simultaneous requests for advice from yourself, on behalf of Dr. Frank Clendenen, and from Mr. Robert Murphy, on behalf of his client, the East Yolo Community Services District. Both requests relate to the same situation and you, Mr. Murphy and I have met to discuss the underlying facts and there is no disagreement as to the material facts. However, since Dr. Clendenen is the person whose "duties under this title [the Political Reform Act]" are in question, it is to your request that this response is addressed.<sup>1/</sup>

### FACTS

Dr. Frank Clendenen is a consulting engineer who does business as Clendenen Engineers ("Clendenen"), a California corporation. Dr. Clendenen is the sole stockholder of Clendenen. Dr. Clendenen is also the sole stockholder and President of Sierra Tech Systems, Inc., a California corporation which manufactures and sells a modular filter system for use in water treatment plants. The system was developed and patented by Dr. Clendenen.

In 1980, the East Yolo Community Services District, a "local government agency" entered into a contract with Clendenen

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<sup>1/</sup> The Political Reform Act is codified at Government Code Sections 81000-91014. All statutory references are to the Government Code. Section 83114(b) provides for the requesting and rendering of written advice under the Act.

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to provide engineering services to the District. It is understood and agreed that while this contract is with Clendenen, the corporation, it is Dr. Clendenen and his services which the District retained. The contract calls for Dr. Clendenen to provide a series of services pertaining to upgrading and improving a domestic water system which the District was in the process of acquiring from private investors. Part of the work has been completed and the contract has just recently been revised to reflect changed circumstances and to provide for outside review of certain aspects of Dr. Clendenen's work.

The design work to be performed requires, among other things, that Dr. Clendenen evaluate and recommend to the District the type of system, process, filters, media, treatment plants, etc., that would be best for the District's water system. The contract further requires the design, purchase and construction of sophisticated water treatment plants, among other things, since the District is generally committed to switching from a ground water supply system to a river water or surface supply system.

In the interim between the execution of the 1980 contract and the present, Dr. Clendenen (on his own time) has developed and patented the modular filter device manufactured by his company, Sierra Tech Systems, Inc. The device has been utilized in other locations in surface water delivery systems which are analogous to that of the District. Hence, it is very likely that Dr. Clendenen will recommend his system to the District as part of his design proposal.

Both Dr. Clendenen and the District desire that the District be able to use the best system available, from whatever source, and that the design of the system and the selection of its components (including filtration devices) not become subject to any taint because of Dr. Clendenen's private financial interest in the sale and manufacture of his filtration device. To that end, the contract has recently been amended to provide, inter alia, as follows:

The System Analysis and Pre-Design work, including but not limited to all of the Engineer's drawings, plans, specifications, notes, worksheets and estimates, pertaining to any and all aspects of water treatment and appurtenant facilities shall be submitted at no cost to the District to an independent, qualified engineering-consulting firm of the District's choice located outside of the Sacramento metropolitan area and independent of any

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Engineer within said area for independent review and analysis to be paid for as hereafter provided. The Engineer (Clendenen) shall be given the right to review and comment solely on the proposed cost (not on the selection) of the independent engineer-consultant.

#### ANALYSIS

Both you and Mr. Murphy have been advised that the Commission does not render advice pursuant to Government Code Section 1090, relating to financial interests in contracts, and I have suggested that you contact the Attorney General's Office with regard to the applicability of that statute.

The Commission does provide advice under the Political Reform Act. The Act's conflict of interest provisions provide that no public official shall make, participate in making, or use his official position to influence any government decision in which he knows or has reason to know he has a financial interest. Section 87100. The first issue to be considered is whether Dr. Clendenen is a "public official" within the meaning of the Act. Section 82048 defines "public official" as:

... every member, officer, employee or consultant of a state or local government agency.

The District is a local government agency. Dr. Clendenen's relationship is that of a consulting engineer to the District as to water matters. The District does not employ on its staff a full-time engineer for water matters and has elected, instead, to retain Dr. Clendenen's services. In this respect, Dr. Clendenen is much like a contract city attorney; the Commission has consistently treated contract city attorneys as public officials when they are performing in that capacity. Those situations, and perhaps the one at hand, appear to differ from the county engineer-surveyor in the Commission's Maloney Opinion, 3 FPPC Opinions 69 (No. 76-082, August 18, 1977). In the Maloney Opinion, the Commission determined that the contract county engineer-surveyor was neither a "consultant" nor an "employee" when performing engineering or surveying tasks which were "not subject to the control or discretion of the county...." The Commission held that "the preparation of surveys and engineering studies ..." did not involve "any official decisionmaking." However, when performing reviews of permit applications, he was held to be a public official.

In the case at hand, Dr. Clendenen's contract with the District provides as follows:

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## ARTICLE I -- ENGINEER SERVICES

The Engineer will serve as the District's professional engineer for and during all of the work herein set forth and shall consult with and advise the District and staff as required during the performance of all work required by this Amended Agreement. The engineering services and work required by this Amended Agreement are divided into three steps, to wit: "Systemn Analysis and Pre-Design;" "Final Design and Construction Documentation;" and "Construction Administration and Inspection." The Engineer shall not proceed to work on any of these steps without separate prior written authorization from the District for each such step.

The Engineer shall do all work, attend all meetings, hearings, and conferences, and produce all reports and documents necessary to provide and complete the following work.

A. System Analysis, Pre-Design, and Project Phasing Report:

Upon receipt of written authorization from the District to proceed:

1. Review and evaluate existing engineering studies and related technical literature dealing with, or bearing on, the community water works;

2. Consult with officials and staff of the District, and of any other public agencies of competent jurisdiction in the delivery of domestic water supply;

3. Conduct a detailed system analysis of the existing domestic water systems within the boundaries of the District in order to refine and compile the data in the July 6, 1978 Feasibility Report, the July 6, 1979 Preliminary Engineering Report, the September 1984 Master Water Study, the documents and resolutions listed in the recitals first set forth herein, and all other data and reports heretofore prepared for the District as necessary to convert to and utilize the "River Water Source Alternatives;"

4. Prepare a specific, detailed Pre-Design Master Plan Report, Plans and Layouts for Project, which

Gerard Rose  
January 16, 1985  
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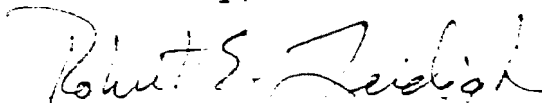
shall contain, but not necessarily be limited to, the following....

In our advice letter to Ron Criss, No. A-82-029, February 8, 1982, we also distinguished between different types of engineering services rendered by a contract consulting engineer. It is not entirely clear into which category Dr. Clendenen's services fall. However, because your question can be resolved on another basis, we will not resolve that issue at this time.

Due to the modification in the contract, supra, there will be an intervening, substantive review of Dr. Clendenen's recommendations as to the system's components (and, hence, any recommendation to use his modular filter system) prior to his recommendations reaching the District's board. Such an outside review was suggested in the Maloney Opinion, supra, and is most appropriate here.<sup>2/</sup> It is our further understanding from our conversations that Dr. Clendenen will not be permitted to comment upon the evaluation by the outside engineer. The independent, substantive and intervening review by a competent outside engineer will separate Dr. Clendenen's recommendations from directly going to the District's board and eliminate the possibility of a conflict of interest, as to those recommendations. Therefore, even if it is determined that Dr. Clendenen is a consultant, he would not be "participating" in the decision under 2 Cal. Adm. Code Section 18700(c) due to the intervening substantive review.

Should you or Mr. Murphy have questions regarding this advice, please do not hesitate to contact me at (916) 322-5901.

Sincerely,



Robert E. Leidigh  
Counsel  
Legal Division

REL:plh  
cc: Robert Murphy

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<sup>2/</sup> Again, we stress that we have not evaluated these circumstances with respect to Section 1090, et seq.

LAW OFFICES OF

GREVE, CLIFFORD, DIEPENBROCK & PARAS

1000 G STREET, SUITE 400

SACRAMENTO, CALIFORNIA 95814-0885

(916) 443-2011

Dec 13 11 05 AM '84  
CLAIRE H. GREVE  
ANTHONY C. DIEPENBROCK  
GERARD A. ROSE  
GORDON W. COOK  
THOMAS S. KNOX  
GARY L. VINSON  
E. EARL SECHRIST III  
LOUIS J. ANAPOLSKY  
JOHN M. LEMMON  
DOUGLAS L. YOUMANS  
STEFAN L. MANOLAKAS  
PAMELA A. BABICH  
DANIEL P. COSTA  
MAUREEN A. FALCONER

EDWARD T. CLIFFORD  
GEORGE E. PARAS  
LAWRENCE A. WENGEL  
WILLIAM C. BARRY  
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GARY SCOTT DECKER  
DENNIS W. RICHARDSON  
JERILYN PAIK  
ROBERT K. POLLAK  
BRADLEY R. LARSON  
H. VINCENT McLAUGHLIN  
SUSAN J. SHERIDAN  
THOMAS F. JEFFREY  
LINDSAY R. BRACK

December 12, 1984

OF COUNSEL  
IRVING H. PERLUSS

GERALD R. JOHNSON (1897-1973)

1750 MONTGOMERY STREET  
SAN FRANCISCO, CALIFORNIA 94111  
(415) 543-6564

REPLY TO SACRAMENTO

TELECOPIER  
(916) 441-7457

Office of Counsel  
Legal Division  
Fair Political Practices Commission  
P. O. Box 807  
Sacramento, CA 95804

Re: Contract between the East Yolo Community  
Services District and Clendenen & Associates  
- Consultants, Inc., a California Corporation

Ladies and Gentlemen:

This firm represents Clendenen Engineers, Inc. a California Corporation ("Clendenen") and Dr. Frank Clendenen in connection with the interest which Clendenen now holds in a contract between Clendenen & Associates - Consultants, Inc. and the East Yolo Community Services District ("East Yolo"). A copy of that contract ("the subject contract") is attached hereto for your reference as Exhibit "A".

The subject contract, which was entered on March 6, 1980, basically calls for system analysis and predesign work, final design and documentation, and construction administration and inspection by Clendenen for a domestic water supply project.

Subsequent to entering the subject contract, Dr. Frank Clendenen, who is the sole stockholder of Clendenen, developed a patent for a modular filter system of a type which is sometimes used in water treatment plants. This system is manufactured and sold by Sierra Tech Systems, Inc., a California Corporation ("Sierra Tech") whose stock is owned one-hundred percent by Dr. Frank Clendenen.

After development of the filter patent, a question was raised about whether Clendenen's role under the subject contract somehow conflicted with Dr. Frank Clendenen's role as owner of the stock in Sierra Tech Systems, Inc. The question was prompted by the fact that the Sierra Tech modular filter

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system was and is of a type that could be incorporated into the East Yolo water supply project. See subject contract, p. 3, § 3(a).

Section 87.100 of the Political Reform Act provides that:

"No public official at any level of state or local government shall make, participate in making, or in any way attempt to use an official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."

In the common meaning of the word, neither Dr. Frank Clendenen nor Clendenen is a "public official" within the meaning of the Act. However, Government Code § 82048 states that:

"'[P]ublic official' means every member, officer, and employee or consultant of a state or local government agency."

It is clear under California law that neither Dr. Frank Clendenen nor Clendenen is a "consultant" within the meaning of the Political Reform Act.

California Administrative Code section 18700 defines a "consultant" as follows:

"'[C]onsultant' shall include any natural person who provides, under contract, information, advice, recommendation, or counsel to a state or local government agency, provided, however, that 'consultant' shall not include a person who '(a) conducts research and arrives at conclusions with respect to his or her rendition of information, advice, recommendation, or counsel independent of the control and direction of the agency or of any agency official other than normal contract monitoring; and (b) possesses no authority with respect to agency decision beyond the rendition of information, advice, recommendation, or counsel.'"

In light of this definition, Clendenen is not a consultant within the meaning of the Political Reform Act for



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at least three reasons: First, Clendenen is a corporation, i.e. a "legal" individual, but not a natural person as defined by the California Administrative Code; second, Clendenen possesses no authority with respect to any Agency decision beyond its presentation of recommendations concerning the water supply project (see subject contract, pp. 4-5); and third, Clendenen finances its own operations, operates as an independent contractor, and its research and conclusions in giving information, advice, recommendations and counsel are not subject to day-to-day review or direction by East Yolo (see subject contract, p. 23, ¶X.C.).

In a similar vein, Dr. Frank Clendenen, though he has no "corporate" status, has no personal contract with East Yolo, and operates solely as a corporate employee, and so, can claim the benefit of the second and third reasons why Clendenen isn't a "consultant" as specified above.

For all the foregoing reasons, neither Clendenen nor Dr. Frank Clendenen is in a position to violate the spirit or the letter of the Political Reform Act, and we seek your advice confirming that fact.

Assuming, solely for the sake of argument, that your advise were negative in this respect, Dr. Clendenen and Clendenen have one additional inquiry.

In order to avoid any appearance of impropriety, and out of an abundance of caution, Clendenen has formally proposed to East Yolo that the subject contract be modified to exclude that portion of any system analysis and predesign work which would require an evaluation of systems encompassing those manufactured by Sierra Tech. That analysis and predesign work would be separately contracted for with another engineer of East Yolo's choosing, and the bill therefor would be charged by East Yolo solely to Clendenen.

If such a proposal were accepted by East Yolo, and assuming solely for the sake of argument that Clendenen or Dr. Frank Clendenen would otherwise be in a potential conflict situation, would that modification of the subject contract remove any semblance of a possible violation of the Political Reform Act?

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Legal Division  
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We trust that this correspondence sets forth all of the information necessary for the Fair Political Practices Commission to render its opinion. Your consideration of this matter is greatly appreciated. We will be more than happy to answer any further questions necessary for a resolution of this matter.

Very truly yours,



GERARD A. ROSE

GAR:bjm  
enclosure  
cc: Dr. Frank Clendenen